



# Oregon Tilth Certified Organic

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May 12, 2006

Mark Bradley, Associate Deputy Administrator  
Transportation & Marketing Programs  
National Organic Program  
1400 Independence Ave., SW, Room 4008-So, Ag Stop 0628  
Washington, DC 20250

RE: § 205.606

Dear Mr. Bradley,

Thank you for this opportunity for Oregon Tilth to comment on the proposed rule Docket Number: TM-06-06-PR. Unfortunately, the current proposal's revised language for section § 205.606 does not accurately support existing regulation found at § 205.270 and § 205.301, nor does it accurately support the Consent Final Judgment and Order issued June 9, 2005 in the U.S. District Court for the District of Maine, in the case of Harvey v. Johanns (Civil No. 02-216-P-H).

Existing regulation specifies commercial availability requirements for products labeled as "organic", while the proposed rule with its insertion and placement of the word "only", applies commercial availability requirements to both the "organic" and "made with organic (specified ingredients or food group(s))," product categories. Application of commercial availability restrictions to nonorganic ingredients used in "made with organic...." products would represent a new regulation not currently found in existing regulation at 7 CFR Part 205 or required by the Organic Food Production Act (OFPA).

The Declaratory Judgment with respect to Count 1 states that 7 CFR § 205.606 shall not be interpreted to create a blanket exemption, to the National List requirements specified in 7 U.S.C. § 6517, permitting the use of nonorganic agricultural products in or on **processed organic products** when their organic form is not commercially available. Consistent with OFPA, § 205.606 shall be interpreted to permit the use of a nonorganically produced agricultural product that has been listed in section § 205.606 pursuant to National List procedures.

With respect to the composition and commercial availability requirements of products labeled "organic" and "made with organic..." applicable sections of the Rule read:

**§ 205.270 Organic handling requirements.**

(b) Nonagricultural substances allowed under § 205.605 and nonorganically produced agricultural products allowed under § 205.606 may be used:

- (1) In or on a processed agricultural product intended to be sold, labeled, or represented as “organic,” pursuant to § 205.301(b), ***if not commercially available in organic form.***
- (2) In or on a processed agricultural product intended to be sold, labeled, or represented as “made with organic (specified ingredients or food group(s)),” pursuant to § 205.301(c).

#### **§ 205.301 Product composition.**

(b) Products sold, labeled, or represented as "organic." A raw or processed agricultural product sold, labeled, or represented as "organic" must contain (by weight or fluid volume, excluding water and salt) not less than 95 percent organically produced raw or processed agricultural products. ***Any remaining product ingredients must be organically produced, unless not commercially available in organic form, or must be nonagricultural substances or nonorganically produced agricultural products produced consistent with the National List in subpart G of this part.*** If labeled as organically produced, such product must be labeled pursuant to § 205.303.

(c) Products sold, labeled, or represented as "made with organic (specified ingredients or food group(s))." Multiingredient agricultural product sold, labeled, or represented as "made with organic (specified ingredients or food group(s))" must contain (by weight or fluid volume, excluding water and salt) at least 70 percent organically produced ingredients which are produced and handled pursuant to requirements in subpart C of this part. No ingredients may be produced using prohibited practices specified in paragraphs (1), (2), and (3) of § 205.301(f). Nonorganic ingredients may be produced without regard to paragraphs (4), (5), (6), and (7) of § 205.301(f). If labeled as containing organically produced ingredients or food groups, such product must be labeled pursuant to § 205.304.

§ 205.270 draws a clear distinction by omitting the commercial availability restriction from subparagraph (2) when describing the “made with organic ...” product category. The same clear distinction is evident when comparing § 205.301(b) with § 205.301(c). Finally, “made with organic ...” products are specifically excluded from the commercial availability restriction referred to as paragraph (6) of § 205.301(f).

Pages 80562 and 80574 of the Final Rule Preamble reiterate and emphasize application of commercial availability restrictions to only “*organic*” products. To paraphrase these discussions, “a large number of commenters, including organic handlers and certifying agents, stated that “commercial availability” must be included as a requirement for the 5 percent of nonorganic ingredients that are used in products labeled "organic." In response, the final rule was amended to require that an agricultural commodity used as an ingredient in a raw or processed product labeled as organic must be organic when the ingredient is commercially available in an organic form.

Existing Rule language found at § 205.606 reads “The following non-organically produced agricultural products *may* be used as ingredients in or on processed products labeled as "organic" or "made with organic (specified ingredients or food group(s))" only in accordance with any restrictions specified in this section.” Accordingly, any ingredient restrictions apply to both “organic” and “made with” products.

The Rule then goes on to read “Any nonorganically produced agricultural product may be used in accordance with the restrictions specified in this section *and when the product is not commercially available in organic form*”. In accordance with sections § 205.270 and § 205.301, commercial availability applies only to “organic” products, therefore operators making a “made with” product would not be required to source organic forms for all ingredients and therefore

would not be required to “only” use non-organic ingredients listed under §205.606. Any other restrictions (i.e. annotations) placed on ingredients listed under § 205.606 would however apply to both “organic” and “made with....” products.

Oregon Tilth respectfully suggests the following changes to the proposed language in § 205.606:

§ 205.606 Nonorganically produced agricultural products allowed as ingredients in or on processed products labeled as organic or made with organic ingredients.

The following nonorganically produced agricultural products may be used as ingredients in or on processed products labeled as “organic” or “made with organic (specified ingredients or food group(s)),” only in accordance with any restriction specified in this section.

Only the following nonorganically produced agricultural products may be used as ingredients in or on processed products labeled as “organic” and when the product is not commercially available in organic form.

- (a) Cornstarch (native)
- (b) Gums – water extracted only (arabic, guar, locust bean, carob bean)
- (c) Kelp – for use only as a thickener and dietary supplement
- (d) Lecithin - unbleached
- (e) Pectin (high-methoxy)

Thank you for receiving our comments and effecting the necessary changes to this proposal.

Sincerely,

Gwendolyn V. Wyard  
Processing Program Reviewer  
On behalf of Oregon Tilth, Inc.